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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL NO. 1069,
Petitioner,

v.

S.D. WARREN COMPANY, A DIVISION OF SCOTT PAPER COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether a federal court's power to vacate arbitration awards which contravene public policy empowers the court to overturn an arbitral decision which neither construes the agreement in a manner that would make the agreement unlawful nor directs the employer to take any action prohibited by law?

2. Whether a federal court's power to vacate arbitration awards which do not "draw their essence" from the collective bargaining agreement empowers the court to overturn an arbitral decision on the ground that the court disagrees with the arbitrator's conclusion that the language of a collective bargaining agreement is open to interpretation and with the arbitrator's reliance on extrinsic evidence of the parties' intent in construing that language?

3. If the answer to either question is "yes," what are the limits of the courts' power to vacate arbitration awards on these grounds?

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v.

S.D. WARREN COMPANY, A DIVISION OF SCOTT PAPER COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the First Circuit in *S. D. Warren Company v. United Paperworkers International Union, Local No. 1069*, 815 F.2d 178 (1st Cir. 1987).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 815 F.2d 178, and is reprinted as Appendix A, pp. 1a-19a, to the separately bound Appendix to this Petition for a Writ of *Certiorari* ("Pet. App."). The opinion of the United States District Court for the District of Maine is reported at 632 F. Supp. 463, and is reprinted at Pet. App. 22a-38a. The arbitrator's award is unreported, and is reprinted at Pet. App. 39a-98a.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on March 31, 1987. A timely petition for rehearing was denied on May 14, 1987. (Pet. App. 20a.) On July 22, 1987, Justice White signed an order extending the time for filing a petition for writ of *certiorari* to and including September 11, 1987. (Pet. App. 98a.) On August 24, 1987, Justice Brennan signed an order further extending the time for filing a petition for writ of *certiorari* to and including October 9, 1987. (Pet. App. 99a.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 203(d) of the Labor-Management Relations Act, 29 U.S.C. § 173(d), provides:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.

STATEMENT OF THE CASE

Petitioners United Paperworkers International Union, Local 1069 ("the Union") and respondent S.D. Warren Co. ("the Company") were, at all times relevant herein, parties to a collective bargaining agreement covering the

production and maintenance employees at the Company's paper mill in Westbrook, Maine. The collective bargaining agreement provided a typical grievance and arbitration procedure for resolution of disputes between the parties.

On February 15, 1984, the Company discharged the three employees whose grievances gave rise to the instant case: Kimberly Denis, Debra Graham, and Linda Willoughby. The Company alleged that each employee had violated Mill Rule 7, which is part of the collective bargaining agreement, and which provides in part as follows:

> 7. Cause for Discharge
>
> • • •
>
> Violations of the following rules are considered causes for discharge:
>
> (a) Possession, use or sale on Mill property of intoxicants, marijuana, narcotics or other drugs.

The Rule goes on to list thirteen other offenses which also "are considered causes for discharge" including smoking in unauthorized areas, destruction or removal of Company property, insubordination, disorderly conduct, dishonesty, sleeping on duty, and violation of certain safety rules.

The Union filed a grievance over each discharge alleging in each case that the Company lacked "proper cause" as required by two separate provisions of the collective bargaining agreement.[1] Under the auspices of the American Arbitration Association, the parties selected Arbitrator Suzanne Gwiazda to render a final and binding decision. Following an eight-day hearing (spanning a period of four months), and after receiving post-hearing briefs, the Arbitrator rendered her 41 page decision and award.

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[1] Article 4 of the collective bargaining agreement provides that the Company retains the right "to . . . discipline, suspend or discharge employees for proper cause." The seniority provision of the contract in turn provided that mill seniority would end upon "discharge for proper cause."

The underlying facts as found by the Arbitrator are as follows. Each discharge was based upon events involving the discharged employee and a Company-employed undercover agent named Al Berry. Although the facts leading to each termination varied to some extent, the Arbitrator found that Berry befriended the grievants, each of whom was a beleaguered female employee working in an all-male area of the mill; that in each case Berry persistently attempted to induce the grievant to provide him with marijuana; and that each grievant resisted Berry's entreaties for a period of time but finally relented and provided Berry with a small amount of marijuana. (*See* Pet. App. 45a-47a.)

For example, the Arbitrator found that Berry approached Willoughly from eight to twelve times in the eight to twelve week period she knew him, and an additional four times on January 30, 1984 alone, on each occasion requesting that Willoughly furnish Berry with marijuana. Willoughby refused each request until, on Berry's last approach, she gave him a small amount of marijuana, refused payment, and told him to leave her alone. (Pet. App. 91a.) Similarly, Denis refused Berry's approaches on three occasions, but finally agreed to act as a "go-between" to attempt to find marijuana for Berry from another employee. (*Id.* at 84a-86a.) Graham refused Berry's requests at least six or seven times before selling him four grams of marijuana. (*Id.* at 88a.)

In each instance, the Arbitrator found that, while the employees had violated the Company rule against possession or sale of marijuana on mill property, their offenses did not constitute "proper cause" for discharge, as required by the collective bargaining agreement. Rather, the Arbitrator held that the Employer could properly suspend the employees for periods of time varying between four and nine months depending upon the nature of the particular employee's offense. (Pet. App. 39a.)

The Arbitrator began by addressing the question of whether, as the Company contained, Mill Rule 7 unambiguously "provides for immediate discharge" for any violation of that Rule. The Arbitrator rejected that contention on several grounds.

First, the Arbitrator looked to the language of the Rule and found that it is not "plain." The Arbitrator stated:

> Granted Section 7 of the Mill Rules is titled "Causes for Discharge," but there is no verb used. It does not say whether such causes "*will* be" or "*may* be" grounds for termination. [Pet. App. 66a.]

The Arbitrator concluded that this ambiguity was resolved by the language of the Company's own "Safety Policy handbook" which provided that the violation of certain rules—including Rule 7(a)—"*may* mean immediate discharge." The Arbitrator reasoned:

> Inasmuch as the safety booklet is a unilateral statement of Company policy, not a negotiated agreement with the Union, the Company had full opportunity to state that violations of [Rule 7 (a)] *will* mean immediate discharge. Instead, it chose to retain discretion over such decisions by using the word "may." In so choosing, it allowed a third party neutral the same discretion when reviewing the propriety of these decisions. [Pet. App. 67a; emphasis added.]

In addition to the contract language, the Arbitrator relied upon the past practices of the parties to conclude that they never intended that Mill Rule 7 would grant to the Company the unreviewable right to impose immediate discharge for any violation of the Rule.[2] The Arbitrator reviewed each of the examples of disciplinary actions contained in the record, involving some forty-one instances of Rule 7 violations and numerous other types

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[2] The Company itself insisted that the Arbitrator was authorized to base her award upon past practice. (*See* Pet. App. 68a.)

of infractions, and concluded that virtually all violations of mill rules over the years had been penalized with something less than discharge. Numerous Rule 7 infractions were met with verbal warnings, while others resulted in written warnings and suspensions of between one day and six months. The longest suspensions on record (six months) involved two employees who embezzled $25,000. In the only two previous Rule 7(a) infractions identified in the record, involving possession of alcohol, the employees were not discharged but placed in the employee assistance program. In only two previous cases—both involving incarceration for serious crimes—had the Company imposed discharge for Rule 7 violations. As the Arbitrator summarized, "[i]f any pattern emerges from an examination of past practice where Mill Rule 7 violations are concerned, it is the Company's consistent effort to help employees redeem themselves before they suffer the loss of their jobs." (Pet. App. 69a.)

Having rejected the Company's contention that under the collective bargaining agreement a violation of Rule 7(a) *ipso facto* constitutes "proper cause" for discharge, the Arbitrator proceeded to consider whether, on the facts of these cases, such cause was established. The Arbitrator stated the following general approach to that question:

> * * * [D]rug activity in the workplace must be viewed as very serious misconduct, but I can find no contractual justification for penalizing it with workplace execution while employees who have engaged in other forms of serious misconduct are merely fined with suspensions or are slapped on the wrist with warnings. Under the proper cause provision, the Company has the right to discipline employees who violate Mill Rules, including the right to discharge where necessary, but the discipline must be reasonably even-handed to be fair or "proper." [Pet. App. 83a-84a.]

After considering all of the surrounding circumstances with respect to the grievants' situation and their deal-

ings with Berry, the Arbitrator concluded that the discharges "were excessively harsh in light of past disciplinary practice for similarly serious Mill Rule 7 violations." (*Id.* at 96a.)[3] The Arbitrator left the grievants with "[h]eavy suspensions" ranging from four to nine months to "impress upon the grievants the seriousness of their misconduct," but, persuaded that the grievants "fully realize this now and will return to work with the determination to be productive employees which motivated them in the first place," the arbitrator overturned the discharges. (*Id.* at 96a.)[4]

Despite its contractual agreement that "the decision of the arbitrator shall be final and binding on the parties," the Company refused to comply and brought this action to vacate the award. Upon cross motions for summary judgment, the District Court denied the Company's motion and enforced the award, holding that the Arbitrator's interpretation drew its essence from the collective bargaining agreement and could not be disturbed. (*Id.* at 22a-38a.)

The United States Court of Appeals for the First Circuit reversed. That court advanced two alternative grounds for its decision.

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[3] Although the Arbitrator noted a number of mitigating circumstances of the type which arbitrators universally consider relevant in just-cause cause—such as the grievants' prior service and work record, the fact that they were induced to misconduct by company agents, and the pressure under which the grievants were working, *see* F. Elkouri and I. Elkouri, *How Arbitration Works* 679-87 (45th ed. 1985)—the Arbitrator placed her principal reliance on the Company's own past disciplinary practice. The court below is therefore wrong in suggesting that the Arbitrator's decision rests on "extenuating circumstances." (*See* Pet. App. 4a.)

[4] The Arbitrator sustained the discharge of a fourth grievant, Marshall Buhelt, who had urged Berry to use marijuana at work; the Arbitrator concluded that this offense was different in kind than the misdeeds of the other three grievants.

Proceeding from the premise that the arbitrator's task is solely to " 'construe ambiguous contract language,' " Pet. App. 8a, *quoting Detroit Coil v. Machinists*, 594 F.2d 575, 579 (6th Cir. 1979), *cert. denied*, 444 U.S. 840—and that the court's own view of "logic, reason and sound principles of contract law" must prevail over those of an arbitrator, Pet. App. 7a—the court of appeals took it upon itself "to see if the contract was ambiguous," Pet. App. 11a. That court decided, in disagreement with the Arbitrator, that the meaning of the contract is plain: "*We disagree* that Mill Rule 7(a) was so ambiguous that it took away from the employer the exclusive right to determine the punishment to be imposed for violation of that clause." *Id.* at 5a (emphasis added). The court below further concluded that the Arbitrator had misconstrued that contract: "[*W*]*e conclude* that the parties at the bargaining table had a meeting of the minds, that in cases of possession, use or sale of marijuana on company property, the employer had a right to discharge." *Id.* at 12a (emphasis added). The court of appeals elaborated:

> By incorporating Mill Rule 7(a) . . . the parties had the intention of allowing one of them, the employer in this case, to determine the nature of the punishment: the maximum of discharge on the first offense or no penalty. Otherwise, the parties would have remained mute and the pretention of this arbitrator as to interpretation of this clause would be valid. . . . We should not be inclined to conclude that what they agreed upon is ambiguous, for that would be splitting hairs to find a way to thwart the contractual will. On the contrary, we should find that the contract has a regular, logical meaning.
>
> * * * *
>
> The arbitrator refused to consider the plain meaning of the words that the parties agreed upon. Under these circumstances, the imposition by the arbitrator of a punishment the parties did not bargain for does not draw its essence from the collective bar-

> gaining agreement and such a construction is not the one the parties bargained for. [Pet. App. 14a, 18a.]

As a second and alternative basis for its holding, the court of appeals concluded that the "arbitration award cannot be enforced as a matter of public policy." Pet. App. 15a. That court reasoned that "there is a well-defined public policy against the use of drugs in the workplace," *id.* at 16a, and that even though the Arbitrator had found that the grievants did not use marijuana at work and would not do so if reinstated, the arbitral award nonetheless contravened this policy. In reaching this conclusion the court below expressly concluded that it is free to set aside an arbitral award on public policy grounds even where the award does not violate positive law, *id.* at 17a-18a; in this regard the First Circuit specifically relied on (*id.* at 18a) the Fifth Circuit's decision in *Misco Inc. v. United Paperworkers International*, 768 F.2d 739 (5th Cir. 1985), which this Court has granted a writ of certiorari to review (No. 86-651).

REASONS FOR GRANTING THE WRIT

The decision below rests on two alternative grounds. One of those two grounds—that the arbitration award is contrary to public policy—raises precisely the same issue that is presently pending before this Court for plenary review in No. 86-651, *Paperworkers v. Misco*: whether a court may set aside an arbitral award as contrary to public policy where the collective bargaining agreement, as interpreted by the arbitrator, is consistent wtih positive law. The court below, like the Fifth Circuit in *Misco*, was of the view that the courts have such an authority; indeed the court below specifically relied on the Fifth Circuit's decision in *Misco* in so doing.

The union in *Misco* is pressing the proposition that the public policy exception to the general rule favoring enforcement of labor arbitration awards is limited to awards that conflict with positive law. Should this Court

sustain that proposition and overturn the Fifth Circuit's *Misco* decision, this first supporting leg for the decision below in this case would fall as well.

The other leg on which the decision below rests is the proposition that where a collective bargaining agreement requires "cause" for discharge and also defines "dischargeable" conduct, arbitrators are required to interpret the agreement as granting the employer an unfettered and unreviewable discretion to decide whether to discharge an employee committing a "dischargeable offense" no matter what the bargaining history, past practice and the facts and circumstances surrounding the offense may show. That proposition has generated a square and irreconcilable conflict among the seven courts of appeals which have confronted the question. Because provisions defining certain acts as cause for discharge are quite common in collective bargaining agreements, the disagreement among the circuits as to the legal effect to be given such provisions is, in and of itself, of great practical importance to the development of the law of labor contracts.

Moreover, the conflict among the circuits on this specific question of labor law reflects a more fundamental divergence of opinion as to the respective role of arbitrators and courts in interpreting collective bargaining agreements. This Court addressed that issue some two decades ago in the *Steelworkers Trilogy*,[5] but over time the appellate courts have arrived at quite different understandings of the *Trilogy*'s lessons. That disagreement threatens the national labor policy favoring arbitration as the means to resolve labor-management disputes, and requires review by this Court.

A. The principles which federal courts are to follow in reviewing labor arbitration awards were announced

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[5] *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960).

by the Court in *Steelworkers v. Enterprise Corp.*, 363 U.S. 593, 596, 599 (1960):

> The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. . . .
>
> • • •
>
> [P]lenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final. . . . [T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his. [Citations omitted.]

This broad deference which courts must accord an arbitration award, *Enterprise* goes on to say, is subject to a narrow exception:

> Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's awards manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award. [*Id.* at 597.]

The Court has often reaffirmed these principles, most recently in *W. R. Grace & Company v. Rubber Workers*, 461 U.S. 757 (1983), but has done so without specifying how the lower courts are to proceed in determining whether a particular award draws its "essence" from the collective bargaining agreement. The result is that

those courts are proceeding in markedly different ways and their irreconcilable decisions jeopardize the arbitral system and the ability of the parties to rely on the finality of arbitral awards.

B. The conflicting approaches of the court of appeals is revealed graphically by the conflicting decisions the appellate courts have rendered on the precise issue raised by this case: whether an arbitration award holding a discharge to be in breach of contract "draws" its essence" from the contract where the agreement contains a provision stating that the ground which the employee was discharged "constitutes [or shall constitute] cause for discharge." *Seven circuits* (including the First Circuit in the instant case) have confronted that very issue in recent years, and have divided 4-3 in their answer.

In concluding that the arbitral award before it was unenforceable, the court below relied on the Sixth Circuit's decision in *Firemen and Oilers Local 935-B v. Nestle Co.*, 630 F.2d 474 (6th Cir. 1980). That case involved a collective bargaining agreement which provided that certain specified offenses (including "incompetency, insubordination, or failure to perform satisfactorily"), "shall constitute cause for the dismissal of any employee from the service of the company." *Id.* at 475. The arbitrator there found that, while the grievant had refused direct orders from his foreman, the employer nevertheless did not have cause to discharge. The arbitrator therefore ordered the employer to reinstate the employee, but without backpay. The Sixth Circuit vacated the award. The Court concluded that the agreement "is clear and unambiguous" and "*needs no interpretation*" and that under the (supposedly) plain meaning of the contract the arbitrator was not empowered "to decide that discharge is too severe a penalty for the insubordination which he found." *Id.* at 476-77 (emphasis in original). *See also Morgan Services, Inc. v. Local 323, Chicago and Central States Joint Board*, 724 F.2d 1217 (6th Cir. 1984);

Autoworkers Local 342 v. TRW, Inc., 402 F.2d 727 (6th Cir. 1968).[6]

In *Mistletoe Express Service v. Motor Expressmen's Union*, 566 F.2d 692 (10th Cir. 1977), which the court below also cited approvingly, the Tenth Circuit reached a similar conclusion. The agreement in question there provided that "employees may be discharged in just cause, among which just causes are the following: . . . (G) failure to settle bills and funds collected for the Company within twenty-four (24) hours." *Id.* at 693-94. The arbitrator ruled that while the employee had violated the rule, discharge was an excessive penalty. The Court vacated the award stating, "We find no ambiguity in the use of 'may' rather than 'will'. The provision gives the employer the option to discharge or not. The employer exercised the option and discharged [grievant]." *Id.* at 695.

In stark contrast to the decisions of the First, Sixth and Tenth Circuits, the Third, Fifth, Seventh and Eighth Circuits have held that federal courts may not overturn arbitration awards of the type involved here. *Arco-Polymers, Inc. v. Local 8-74*, 671 F.2d 752 (3rd Cir. 1982) is illustrative of this latter set of decisions. The collective bargaining agreement in that case contained a "just cause" provision and a provision stating that employees committing certain offenses "shall be subject to discharge". The arbitrator ruled that "just cause" was lacking for the grievant's discharge even though the grievant had committed a "dischargeable offense." The

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[6] The arbitrator in *Nestle Co.* actually "made no specific findings" as to whether the grievant's conduct constituted "insubordination" within the meaning of the collective bargaining agreement. 630 F.2d at 477. The Sixth Circuit held, however, that the facts as found by the arbitrator "constituted insubordination as a matter of law." *Id.* The court based that conclusion on the definition of insubordination contained in Black's Law Dictionary. *Id.*

Third Circuit enforced that award, explaining (*id.* at 753):

> [A]n arbitrator's award "draws its essence from the collective bargaining agreement" if:
>
> > the interpretation can in any rational way be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties' intention; only where there is a manifest disregard of the agreement totally unsupported by principles of contract construction and the law of the shop, may a reviewing court disturb the award. [*Ludwig Honold Mfg. Co. v. Fletcher.* 405 F.2d 1123, 1128 (3rd Cir. 1969).]
>
> As described by Professor Gorman, this standard requires only "minimal rationality" of the arbitrator's decision.[7]

Similarly, in *F. W. Woolworth Co. v. Miscellaneous Warehousemen*, 629 F.2d 1204 (7th Cir. 1980), the Seventh Circuit enforced an arbitration award which overturned a discharge of an employee whom the arbitrator found had committed a "technical violation" of a company rule. The collective bargaining agreement in that case required just cause for discharge and provided that "[v]iolation of any Company rule shall be considered as just cause." Like the Third Circuit, the Seventh Circuit upheld the arbitrator's conclusion that the contract did not mean that every "dischargeable offense" necessarily provides just cause for discharge. The Seventh Circuit stressed the primacy of labor arbitrators in interpreting labor agreements and the limited scope of judicial review of arbitral awards, adding:

> Neither the correctness of the arbitrator's conclusion nor the propriety of his reasoning is relevant to a

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[7] *See also Super Tire Engineering Co. v. Teamsters Local Union No. 676*, 721 F.2d 121 (3rd Cir. 1983); *Teamsters Local 863 v. Egg Producers*, 773 F.2d 530 (3rd Cir. 1985).

> reviewing court, so long as his award complies with the aforementioned standards to be applied by the reviewing court in exercising its limited function. [629 F.2d at 1215.]

See also the Fifth Circuit's decision in *Waverly Mineral Products Co. v. Steelworkers*, 633 F.2d 682 (5th Cir. 1980) and the Eighth Circuit's decision in *Kewance Machinery v. Teamsters Local 21*, 593 F.2d 314 (8th Cir. 1979).

In reaching its decision below, the First Circuit expressly followed the decisions of the Sixth and Tenth Circuits in *Nestle* and *Mistletoe Express Service*, while implicitly rejecting the contrary approach taken by the Third, Fifth, Seventh and Eighth Circuits. Had this case arisen in the latter circuits, the award clearly would have been enforced as the courts in those circuits would have viewed it as within the arbitrator's province to harmonize the "proper cause" provision of the contract here with the Mill Rule defining "dischargeable offenses," and thus would not have interfered with the arbitrator's resolution of that issue.

C. The conflict among the circuits just noted reflects a fundamental disagreement among the courts of appeals concerning the respective roles of arbitrators and courts in interpreting collective bargaining agreements. That conflict threatens the arbitral system as a whole.

At bottom, the decision below in the instant case, and the decisions of the Sixth and Tenth Circuits on which the court below relied, rest on two propositions: first, that if the language of a contract is "plain," the contract must be read literally without regard to bargaining history, past practice, industry custom or the like; and second, and more importantly, that the question of whether contract language has a plain meaning is a *question of law* which the courts are to resolve *de novo*. That this is the theory of the latter two courts is clear from the opinions in *Nestle* and *Mistletoe Express* which we pre-

viously quoted. And the opinion below is, if anything, even more explicit in this regard: after stating (in words borrowed from the Sixth Circuit) that the arbitrator " 'may construe ambiguous contract language' " but may not " 'disregard or modify plain and unambiguous provisions,' " the First Circuit framed the inquiry before it as follows: "we must examine the award and the judgment below in the light of the contract to see if the contract was unambiguous." Pet. App. 11a. And completely ignoring the Company's own handbook and its past practice on which the Arbitrator had relied, *see* pp. 5-6 *supra*, the court of appeals overturned the award because "[w]e disagree that Mill Rule 7(a) was so ambiguous that it took away from the employer the exclusive right to determine the punishment to be imposed . . . ." *Id.* at 5a.[8]

Perhaps the clearest demonstration of how far the courts with which the First Circuit has aligned itself are prepared to go in overturning arbitral awards is the recent decision by the Sixth Circuit, whose earlier decisions paved the way for the decision below in the instant case, in *Dobbs Inc. v. Local 614, International Brotherhood of Teamsters*, 813 F.2d 85 (6th Cir. 1987). In *Dobbs*, the Sixth Circuit made explicit the implications of the earlier rulings by holding that an arbitration award *fails* to draw its essence from the contract whenever:

> (1) an award conflicts with express terms of the collective bargaining agreement, (2) an award imposes additional requirements that are not expressly provided in the agreement, (3) an award is without rational support or cannot be rationally derived from the terms of the agreement, and (4) an award is

[8] To be sure, the decision below, and the decisions on which the court below relied, contains an obligatory sentence paying lip-service to the principle of limited judicial review. Nonetheless, as shown in text, the reasoning of those courts, and their actual holdings, rest on the activist premises stated in text.

> based on general considerations of fairness and equity instead of the precise terms of the agreement . . . *Id.* at 86 (citation omitted).

Under this approach, past practice, bargaining history, and all other indicia of the intent of the contracting parties become irrelevant, so long as the *court* determines that the arbitrator's award is at odds with the "precise terms" of the agreement, or concludes that the arbitrator has found an implied agreement not "expressly provided" in the contract's written language.

In contrast, the courts of appeals on the opposite side of the question presented here have enforced arbitral awards indistinguishable from the instant award because those courts have a very different understanding of the judicial role in reviewing decisions of arbitrators: *viz.*, that arbitrators are entitled to rely on "context and any other indicia of the parties' intention," p. 14 *supra*, and are *not* duty bound to give a dryly literal reading to the contract's words unilluminated by the other factors that normally go into ascertaining the intent behind those words. *A fortiori*, those courts have not arrogated to themselves the power to determine whether the language of a contract is "plain," or to impose the court's understanding of the contract language on the parties. To the contrary, those courts understand that, as the arbitrator "was engaged in construction and interpretation of the collective bargaining agreement," the judicial role is at an end and the arbitral award is entitled to enforcement. *Kewanee Machinery*, *supra*, 593 F.2d at 318.

D. In our view, it is only these latter decisions—and not decisions such as the one below—which are faithful to the lessons of the *Steelworkers Trilogy*. The *Trilogy* teaches that "[t]he labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining

agreement although not expressed in it." *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 581-82 (1960).[9] More fundamentally, the *Trilogy* recognizes that when the parties provide for arbitration in a collective bargaining agreement, "[i]t is the arbitrator's construction which was bargained for" and hence "the question of interpretation . . . is a question for the arbitrator." *Enterprise Corp.*, 363 U.S. at 599. And most important of all, the *Trilogy* holds that the arbitral system must not be disturbed by "excessive judicial interference," *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568 n.6 (1960), and thus that an arbitral award may not be overturned merely because the court's "interpretation of the contract is different from [the arbitrator's]," *Enterprise Corp.*, 363 U.S. at 599.

E. If all that were involved here were "merely" a 4 circuit to 3 circuit conflict as to the meaning of collective bargaining agreement provisions defining "dischargeable offenses," and the role of the courts in this category of disputes, there would be ample reason for the Court to issue a writ of *certiorari* in this case. Given the prevalance of contract provisions of this type, the conflict among the courts of appeals with respect to these provisions in and of itself warrants resolution by this Court. Absent such review, unions and employers cannot know with any certainty what significance will be given to the inclusion of such a provision in a collective bargaining agreement, and agreements which are national in scope and intended to be uniform in their application will have different meanings in different jurisdictions.

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[9] *See also* Justice Brennan's concurring opinion in the *Trilogy*, 363 U.S. at 570: the meaning of the labor agreement "is not to be found simply by reference to the dictionary definitions of the words the parties use. . . . Words in a collective bargaining agreement, rightly viewed by the Court to be the charter instrument of a system of industrial self-government . . . are to be understood only by reference to the background which gave rise to their inclusion".

As we have seen, however, far more is at stake here than a conflict over the approach to a particular contract clause category; the decision below is the result of a deeper conflict regarding the proper scope of judicial review of labor arbitration awards. That conflict makes it imperative for this Court to resolve the dispute in the lower courts.

As this Court has stated "the basic policy of national labor legislation [is] to promote the arbitral process as a substitute for economic warfare." *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 105 (1961). The *Steelworkers Trilogy's* holding that the merits of labor arbitration awards may not be reviewed by the courts is an essential element of this policy. As the Court recognized there, if the merits of awards were routinely subject to wide-ranging judicial review, the finality which the parties seek in arbitration would be lost, as would the primary attraction of arbitration as a substitute for economic warfare. Yet the decision below (and the like decisions of the Sixth and Tenth Circuits) strips all arbitral awards of any claim to finality, and opens the courthouse doors wide to attacks on decisions of arbitrators by holding out the prospects of a judicial invalidation of an arbitral award whenever a court can be persuaded that the award is inconsistent with the bare words of the contract read in a literalistic fashion.[10]

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[10] There has been a significant increase in the number of appellate court cases attacking decisions of arbitrators. In the five-year period between 1971-75, there were fewer than 15 of such reported cases. *See* 2 Bureau of National Affairs, *Labor Relations Cumulative Digest and Index, 1971-75*, pp. 1659-67 (1976). In the five-year period between 1981-85, the number of such cases more than tripled, to over 50. *See* 2 Bureau of National Affairs, *Labor Relations Cumulative Digest and Index, 1981-85*, pp. 2549-71 (1986).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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